**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**

**UNITED STATES OF AMERICA**

**v.** **Case No. 8:03-CR-77-T-30TBM**

**HATEM NAJI FARIZ**
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**MOTION TO DISMISS BASED ON THE DOCTRINE OF COLLATERAL ESTOPPEL AND MEMORANDUM OF LAW IN SUPPORT**

Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to the Fifth Amendment's Double Jeopardy Clause, respectfully requests that this Honorable Court dismiss the remaining counts against Mr. Fariz, namely Counts 1, 3, 4, 20, 33, 38, 39, and 40, based on the collateral estoppel doctrine. Mr. Fariz respectfully requests oral argument. Local Rule 3.01(d). As grounds in support, Mr. Fariz states:

## I. Introduction

After nearly a six-month trial, on December 6, 2005, the jury reached a unanimous verdict acquitting Mr. Fariz of Count 2 (conspiracy to murder or maim persons abroad), Counts 12, 14, 15, 18, 19, and 21 (six of the seven remaining Travel Act counts),[1] Counts 22 through 32 (all of the substantive material support counts), and Counts 34 through 37 and 41 through 43 (seven of the eleven money laundering counts). (Doc. 1467). The jury did not reach a verdict as to Count 1 (RICO conspiracy), Count 3 (material support conspiracy),

[1] The Court had already entered a judgment of acquittal on two Travel Act counts against Mr. Fariz (Counts 13 and 16). (Doc. 1418).

Count 4 (IEEPA conspiracy), Count 20 (Travel Act), and Counts 33 and 38 through 40 (money laundering). The Court declared a mistrial on those counts. (Doc. 1468).

Mr. Fariz respectfully requests that this Court dismiss the remaining counts against him on the basis of collateral estoppel, pursuant to the Fifth Amendment's Double Jeopardy Clause. As will be explained in more detail herein, the jury's verdicts of acquittal necessarily determined an issue of fact that precludes the government from re-prosecuting the remaining charges. Accordingly, Mr. Fariz requests that Counts 1, 3, 4, 20, 33, 38, 39, and 40 be dismissed.

## II. Argument

### A. Legal Standards

In *Ashe v. Swenson*, 397 U.S. 436 (1970), the Supreme Court recognized that the doctrine of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy. *Id*. at 443-47. Collateral estoppel means "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443; *United States v. Shenberg*, 89 F.3d 1461, 1479 (11th Cir. 1996). To determine whether collateral estoppel applies in the context of a retrial, *Ashe* requires that the Court engage in a two-part test. *Shenberg*, 89 F.3d at 1479.

First, the Court must determine whether or not it can determine the basis for acquittal at trial through a practical inquiry into the jury's verdict, taking into account the indictment, evidence, jury instructions, and other relevant matter from the trial in this case. *Ashe*, 397

U.S. at 444; *see also Shenberg*, 89 F.3d at 1479 ("First, courts must examine the verdict and the record to see 'what facts,' if any, were necessarily determined in the acquittal at the first trial.").[2] Second, based on that inquiry, the Court must then determine "whether a rational jury could have reached its not guilty verdict without having decided an ultimate issue of fact which the government seeks to litigate in the later prosecution." *Id.*; *see also Shenberg*, 89 F.3d at 1479 ("Second, the court must determine whether the previously determined facts constituted 'an essential element' of the mistried count."). Mr. Fariz bears the burden of persuading the Court at both stages of the test. *United States v. Quintero*, 165 F.3d 831, 835 (11th Cir. 1999). For the ease of discussion, Mr. Fariz applies this test to the remaining counts in an order different than they appear in the indictment.

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[2] As the Supreme Court stated at length:

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all of the circumstances of the proceedings.' . . . Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

*Ashe*, 397 U.S. at 444 (footnotes and citation omitted).

**B. Counts 33, 38, 39, and 40 – Money Laundering**

Mr. Fariz was acquitted of all eleven counts of providing material support or resources to a designated foreign terrorist organization ("FTO") under 18 U.S.C. § 2339B. Each count alleged a money transfer from Mr. Fariz to Salah Abu Hassanein or Naim Nasser Bulbol through Middle East Financial Services ("MEFS"). The very same transactions were also charged, in Counts 33 through 43, as money laundering under 18 U.S.C. § 1956(a)(2)(A). The jury reached a unanimous not-guilty verdict as to seven of these counts, but hung on the remaining four.

To have obtained a conviction on the material support counts, the government would have had to prove each of the following elements beyond a reasonable doubt:

> First: That the Defendant provided or attempted to provide material support or resources within the United States; and
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> Second: That the Defendant provided or attempted to provide the material support or resources to the Palestinian Islamic Jihad - Shiqaqi Faction, as charged in the Superseding Indictment; and
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> Third: That the Defendant did so knowingly.

(Doc. 1431, Jury Instruction No. 35). The term "knowingly" in the context of the material support charge was defined to require that the government also prove each of the following beyond a reasonable doubt:

> First: The Defendant knew that material support or resources would be provided to the Palestinian Islamic Jihad - Shiqaqi Faction

> Second: The Defendant knew either that the Palestinian Islamic Jihad - Shiqaqi Faction was designated by the United States government as a Foreign Terrorist Organization or that the Palestinian Islamic Jihad - Shiqaqi Faction was an entity that engaged in terrorist activity; and
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> Third: The Defendant has the specific intent that the material support or resources provided would further the illegal activities of the Palestinian Islamic Jihad - Shiqaqi Faction. This intent may be determined from all of the surrounding circumstances.

(*Id.*).

Mr. Fariz did not dispute during the trial that he transferred or provided the money to Abu Hassanein or to Bulbol. *See, e.g.,* Doc. 1201, Opening Statement of Kevin Beck, at 71-73. Indeed, Mr. Fariz did not dispute that the telephone calls or money transfers in which he was involved occurred. *See, e.g., id.* at 67 ("Now, this case is not only long and difficult and sometimes confusing - - it's not my intent to make it any more confusing. I'll tell you from the outset that what the government alleges occurred in great part is what we will tell you occurred."). Instead, Mr. Fariz's contention at trial was that when he sent the money to Abu Hassanein and Bulbol, he sent the money for charitable purposes, thereby negating the government's contention that he had provided material support to the Palestinian Islamic Jihad ("PIJ") with the specific intent to further the unlawful activities of the PIJ. *See, e.g., id.* at 72 ("Now, the government has told you that the fundraising in this case for charitable purposes didn't occur. Certainly not the case where Hatim Fariz is concerned.").

Based on a realistic and rational examination of the arguments at trial, the evidence presented at trial, and the jury instructions, the jury must have found that the government either did not prove (1) that Mr. Fariz provided or attempted to provide material support or resources to the PIJ, or (2) that Mr. Fariz did so knowingly, including with the specific intent to further the unlawful activities of the PIJ. By implication, if the jury found that the government did not prove that the funds were provided or were attempted to be provided *to the PIJ*, then the jury must necessarily have also concluded that the government had not proven that Mr. Fariz had the specific intent to further the unlawful activities of the PIJ. Thus, the jury must have found, directly or by implication, that Mr. Fariz lacked this specific intent.

The remaining elements cannot explain the jury's verdict of acquittal. As to the first element, Mr. Fariz never disputed that he (1) provided (2) money, and (3) that money is a material support or resource. Nor, moreover, did Mr. Fariz ever dispute that he knew that the PIJ was either a designated foreign terrorist organization or that it engaged in terrorist activity. Thus, the only dispute concerned whether, when Mr. Fariz transferred (provided) the money (a material support or resource), did he provide it to the PIJ with the specific intent to further the unlawful activities of the PIJ. The jury must have found that he did not.

The money laundering charges actually require the same, if not additional, elements to be proven by the government. Specifically, the government had to prove each of the following to obtain a conviction under the money laundering statute:

> First: That the Defendant knowingly transmitted or transferred funds from a place in the United States to a place outside of the United States, or attempted to do so; and
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> Second: That the Defendant engaged, or attempted to engage, in the transmission or transfer with the intent to promote the carrying on of "specified unlawful activity."

(Doc. 1431, Jury Instruction No. 36). The term "specified unlawful activity" was defined to mean:

> (1) knowingly providing or attempting to provide material support and resources to the Palestinian Islamic Jihad - Shiqaqi Faction, as a designated Foreign Terrorist Organization, with the specific intent to further the unlawful activities thereof; or (2) willfully contributing funds, goods and services to, or for the benefit of, the Palestinian Islamic Jihad - Shiqaqi Faction, as a Specially Designated Terrorist, with the specific intent to further the unlawful activities thereof.

(*Id.*).

As Mr. Fariz argued in a pretrial motion to dismiss and his renewed motion for judgment of acquittal, there really is no appreciable difference between the substantive material support and money laundering counts, as charged. (Doc. 707 at 24-28; Doc. 718 at 24-28; Doc. 1478 at 10-12). The money laundering counts do require that the money was transferred from a place inside the United States to a place outside of the United States. (Doc. 833, Order at 9-10) (rejecting multiplicity argument, finding that the money laundering requires that the money be transferred abroad, and that the material support requires the

designation of a foreign terrorist organization).[3] Mr. Fariz, however, did not dispute that the money he transferred through MEFS in Illinois to Abu Hassanein and Bulbol in the Middle East went from a place inside the United States to a place outside the United States. Nor, moreover, did Mr. Fariz dispute that, as a factual matter, the U.S. government had designated the PIJ as an FTO or specially designated terrorist ("SDT").[4] No rational jury would have acquitted on these bases.

The money laundering counts include two alleged specified unlawful activities. The first is knowingly providing material support to the PIJ. For the government to prove that Mr. Fariz engaged in the transfer of the money with the intent to promote providing material support, the government would have to prove (1) that Mr. Fariz engaged in the money transfer to provide or attempt to provide material support or resources to the PIJ, and (2) that Mr. Fariz did so knowingly, including with the specific intent to further the unlawful activities of the PIJ, the same elements as material support. As reasoned above, because the jury acquitted on the substantive material support, they had to find that the money was not provided or attempted to be provided *to the PIJ*, and/or that Mr. Fariz did not do so *knowingly or with the specific intent to further the unlawful activities of the PIJ*. Because the government would have to prove both of these elements at a retrial of the money

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[3] By making this argument, Mr. Fariz is not waiving his previous multiplicity argument.

[4] Mr. Fariz did make legal challenges to the designations, outside the presence of the jury.

laundering counts, such a prosecution should be precluded on grounds of collateral estoppel. *See Johnson v. Estelle*, 506 F.2d 347, 350 (5th Cir. 1975) ("Thus the fact that either identity or intent could have been the basis for the first jury's decision does not foreclose the application of *Ashe v. Swenson*, because both factors would have to be proven in order to convict at the second trial. Where a determination of innocence on one of two issues was the cause of an acquittal and a determination of guilt on both issues is necessary for a subsequent conviction, the State is estopped from bringing the action.").[5]

The money laundering counts also allege as a specified unlawful activity contributing funds to or for the benefit of the PIJ, as a SDT, with the specific intent to further the unlawful activities of the PIJ. Similarly, to acquit Mr. Fariz of the substantive material support, the jury had to have found that the government did not prove that Mr. Fariz provided or attempted to provide the money *to the PIJ*, and/or that he did not do so *knowingly or with the specific intent to further the unlawful activities of the PIJ*. This finding of fact means that the government failed to prove that Mr. Fariz engaged in the money transfers with the intent to contribute *to or for the benefit of the PIJ* and/or that Mr. Fariz did so knowingly, including with the specific intent to further the unlawful activities of the PIJ. The fact that the PIJ was designated as an SDT for this offense rather than an FTO is of no moment, because Mr. Fariz did not dispute either designation before the jury as a factual matter. Because the

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

government would have to prove both (1) that Mr. Fariz transferred the money with the intent to contribute to or for the benefit of the PIJ and (2) with the specific intent to further the unlawful activities of the PIJ, the government cannot re-prosecute Mr. Fariz for the remaining money laundering charges without violating collateral estoppel principles embodied in the Fifth Amendment. *Johnson*, 506 F.2d at 350. Accordingly, Mr. Fariz respectfully requests that this Court dismiss Counts 33, 38, 39, and 40.

**C. Count Three – Conspiracy to Provide Material Support**

Count Three charges Mr. Fariz with knowingly conspiring to provide material support to the PIJ in violation of 18 U.S.C. § 2339B. The jury instructions for Count Three required the government to prove beyond a reasonable doubt that:

> First: Two or more people, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan;
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> Second: The object of the unlawful plan was to provide material support or resources to the Palestinian Islamic Jihad - Shiqaqi Faction, as charged in the Superseding Indictment; and
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> Third: That the Defendant, knowing the unlawful purpose of the plan, willfully joined it;
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> To find that the Defendant acted "knowingly" in the context of this offense, [the government had to prove] beyond a reasonable doubt that:
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> First: The Defendant knew that material support or resources would be provided to the Palestinian Islamic Jihad - Shiqaqi Faction

> Second: The Defendant knew either that the Palestinian Islamic Jihad - Shiqaqi Faction was designated by the United States government as a Foreign Terrorist Organization or that the Palestinian Islamic Jihad - Shiqaqi Faction was an entity that engaged in terrorist activity; and
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> Third: The Defendant had the specific intent that the material support or resources provided would further the illegal activities of the Palestinian Islamic Jihad - Shiqaqi Faction. This intent may be determined from all of the surrounding circumstances.

(Doc. 1431, Jury Instruction No. 31). As mentioned above, Mr. Fariz did not dispute that the PIJ was designated as an FTO as a factual matter, that he knew that the PIJ was designated or engaged in terrorist activity, or that money was a type of material support or resource.

Based on a rational and realistic review of the record in this case, *Ashe*, 397 U.S. at 444, the government should be estopped from relitigating the issue of Mr. Fariz's involvement in a conspiracy to provide material support to the PIJ. To have acquitted Mr. Fariz of substantive material support, the jury had to have found that when Mr. Fariz sent money to Salah Abu Hassanein and Naim Nasser Bulbol, he either did not provide to the PIJ or he did not have the specific intent to further its illegal activities. Accordingly, the government cannot relitigate either one of these two dispositive issues. *Johnson*, 506 F.2d at 350.

The jury's finding, because of the specific facts and circumstances of this case, *Ashe*, 397 U.S. at 444, should also foreclose the government's ability to subject Mr. Fariz to further

prosecution on these same issues but in a conspiracy count. In the absence of Mr. Fariz providing money to the PIJ with the specific intent to further the unlawful activities of the PIJ (which the jury already found), any agreement to provide this money cannot be said to be an unlawful agreement or conspiracy. *United States v. Whiteside*, 285 F.3d 1345, 1351 n.1 (11th Cir. 2002) ("Since the defendants' act . . . was not an illegal act, it follows *a fortiori* that defendants' alleged 'agreement' [to do this act] was not a criminal conspiracy."). Accordingly, the government cannot seek to re-prosecute Mr. Fariz for a conspiracy to violate 18 U.S.C. § 2339B without violating the collateral estoppel principles embodied in the Fifth Amendment, because to do so the government would have to relitigate that Mr. Fariz intended to provide material support or resources to the PIJ with the specific intent to further the unlawful activities of the PIJ.[6] Indeed, the case against Mr. Fariz concerned only

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[6] In light of the specific facts and circumstances of the instant case, *Ashe*, 397 U.S. at 444, Mr. Fariz respectfully submits that this case is distinguishable from *United States v. Quintero*, 165 F.3d 831 (11th Cir. 1999). In *Quintero*, the defendant had been acquitted, among other counts, of money laundering conspiracy, but the jury had hung on a substantive money laundering count. *Id.* at 836-37. The Court rejected the finding that the jury had acquitted because the defendant lacked the criminal intent, reasoning that if the lack of intent had been the reason for the acquittals, the jury would have also acquitted him of the substantive money laundering charge. *Id*. Instead, the Eleventh Circuit determined that the jury must have acquitted the defendant of the conspiracy because of failure to prove that the defendant knowingly entered into an agreement. *Id.* at 837.

The instant case presents a different situation. The jury, conversely, acquitted of all substantive counts but did not reach a verdict on the conspiracy count. The jury could not have acquitted Mr. Fariz of the substantive material support counts without finding that he did not provide the money to the PIJ with the specific intent to further the unlawful activities of the PIJ. Such a finding forecloses the possibility that Mr. Fariz entered into an unlawful agreement to do the same, *Whiteside*, 285 F.3d at 1351 n.1, and the government should be foreclosed from re-prosecuting Mr. Fariz on Count Three.

whether he provided, or conspired to provide, the material support or resource of money to the PIJ with the specific intent to further the unlawful activities of the PIJ.[7] Accordingly, Mr. Fariz requests that this Court dismiss Count Three.

### D. Count Four – Conspiracy to Make or Receive Contributions of Funds, Goods, or Services to or for the Benefit of the PIJ

Count Four alleges that, from January 25, 1995 to the date of the Superseding Indictment, Mr. Fariz violated 18 U.S.C. § 371 by conspiring to make or receive contributions of funds, goods, or services to or for the benefit of Specially Designated Terrorists, namely the PIJ, Ramadan Shallah, Abd Al Aziz Awda, and Fathi Shiqaqi, in violation of Executive Order 12947, 50 U.S.C. § 1705, and 31 C.F.R. § 595. The jury's

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The instant case is also distinguishable from *United States v. Corley*, 824 F.2d 931 (11th Cir. 1987), in which the Eleventh Circuit held that the defendant's acquittal of the substantive charge did not foreclose prosecution on the conspiracy charge, though the government was barred from introducing the acquitted conduct into evidence. In *Corley*, there was some other evidence of Corley's possible association with the conspiracy, besides the overt acts for which the jury must have acquitted on the substantive count, including testimony of alleged co-conspirators. 824 F.2d at 937 ("We do not have to find that there was sufficient evidence to convict Corley of conspiracy, only that, after excluding the evidence necessary for acquittal on the substantive count, there was sufficient evidence to raise some doubts in a rational jury about Corley's innocence or guilt on the conspiracy count."). In the instant case, Mr. Fariz was alleged to be the actor or doer, sending the money abroad, and the government did not produce other evidence of his entrance into a conspiracy that would allow for re-prosecution without violating collateral estoppel principles.

[7] The case against Mr. Fariz centered on his telephone conversations relating to fund-raising and sending money abroad, and on his transfers of money abroad. Indeed, when counsel for Mr. Fariz moved for a judgment of acquittal and began to address other types of material support or resources, the Court told counsel to address the money. Additionally, the fact that the government sought a *Pinkerton* instruction concerning the potential liability of other Defendants based on the money transfers of Mr. Fariz to Abu Hassanein and Bulbol (Doc. 1431, Jury Instruction No. 37), further supports this argument that the government perceived this case to center around Mr. Fariz's money transfers to Abu Hassanein and Bulbol.

findings of fact concerning the material support charges in Counts 22 through 32 should also preclude the government from re-prosecuting Count Four.

To find Mr. Fariz guilty of Count Four, the government was required to prove beyond a reasonable doubt that:

> First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan;
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> Second: That the object of the plan was to make or receive a contribution of funds, goods, or services, to, or for the benefit of, a Specially Designated Terrorist;
>
> Third: That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it;
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> Fourth: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the "overt acts" described in the Superseding Indictment; and
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> Fifth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

(Doc. 1431, Jury Instruction No. 32). To prove that Mr. Fariz acted knowingly and willfully, the government had to prove beyond a reasonable doubt that:

> First: The Defendant knew that the purpose of the plan was to make or receive a contribution of funds, goods, or services, to, or for the benefit of, an individual or entity who either had been designated as a "Specially Designated Terrorist" or (a) had committed, or posed a significant risk of committing, acts of violence that have the purpose or effect of disrupting the Middle East peace process, (b) had assisted in, sponsored, or provided financial, material or technological support

> for, or services in support of, such acts of violence, or (c) was owned or controlled by, or acted for or on behalf of, any Specially Designated Terrorist; and
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> Second: The Defendant specifically intended that the contribution would further the unlawful activity of the Specially Designated Terrorist.

*(Id.)*. At trial, Mr. Fariz did not dispute that he knew the PIJ, Ramadan Shallah, Abd Al-Aziz Awda, and Fathi Shiqaqi were SDT's or engaged in terrorist activity.

Thus, in order to prosecute Mr. Fariz for Count Four, the government would have to prove that he conspired to contribute funds, goods, or services to an SDT with the specific intent to further their unlawful activities. While Mr. Fariz sent funds to Abu Hassanein and Bulbol, the jury must have found that those funds were not for the benefit of the PIJ and/or that Mr. Fariz did not have the specific intent to further the unlawful activities of the PIJ or an SDT. Both of these facts would be required to prove a violation under Count Four, with respect to the case against Mr. Fariz. *Johnson*, 506 F.2d at 350. Any agreement, moreover, would not be illegal absent this intent. *Whiteside*, 285 F.3d at 1351 n.1. The government clearly centered its prosecution of Mr. Fariz on these set of facts. The remaining evidence would also not amount to the contribution of funds, goods, or services to or for the benefit of an SDT with the requisite specific intent.[8] Thus, applying the doctrine of collateral estoppel rationally and realistically based on the facts and circumstances of this case, Count Four should be dismissed against Mr. Fariz.

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[8] Mr. Fariz fully reincorporates and asserts his arguments made in support of his renewed motion for judgment of acquittal. (Doc. 1478).

### E. Count One – RICO Conspiracy

Count One of the Superseding Indictment alleges that, from in or about 1984 and continuing until about the date of the Superseding Indictment, Mr. Fariz and the other Defendants knowingly, willfully, and unlawfully conspired to violate 18 U.S.C. § 1962(c), in violation of 18 U.S.C. § 1962(d). The Superseding Indictment alleged that Mr. Fariz and the other Defendants conspired to participate, directly and indirectly, in the affairs of an enterprise, through a pattern of racketeering activity. The enterprise was alleged to be the PIJ, which in turn was allegedly comprised of other entities, including AMCN and Elehssan. (Doc. 636 at 8-9).

The jury acquitted all four Defendants of Count Two alleging a conspiracy to murder or maim persons abroad in violation of 18 U.S.C. § 956. This offense consists of two main elements: first, that the defendant willfully entered into an agreement with at least one other person to carry out an unlawful plan, the object of which was to murder or maim a person outside the United States; and second, that a co-conspirator committed at least one overt act within the United States. Based on the allegations in the indictment, the evidence and arguments presented by the government at trial, and the positions taken by the Defendants at trial, it is apparent that the jury acquitted the Defendants based on their conclusion that the government did not prove that any Defendant entered into any agreement to carry out the unlawful plan of murdering or maiming person abroad. Based on the specific facts and circumstances of this case, the jury could not have made the determination that the Defendants *did* enter into a conspiratorial agreement to commit murder but *did not* carry out

any overt act. The government did not make any distinction between its evidence of a criminal agreement and evidence of overt acts. If the jury believed the government's argument that the evidence presented - phone calls, money transfers, etc. - was evidence of a conspiratorial agreement, they would necessarily have found that same evidence to constitute overt acts. Consequently, the jury must have made the determination that Mr. Fariz did not enter into the conspiracy.[9]

As argued at greater length above, the jury must also have made the determination that Mr. Fariz, when he sent the money to Abu Hassanein and Bulbol, did not provide money to the PIJ with the specific intent to further the unlawful activities of the PIJ. This finding also has some bearing to the government's ability to re-prosecute Mr. Fariz for RICO conspiracy.

Count One requires that the Defendant enter into an agreement to accomplish a common and unlawful plan, the object of which was to participate in the conduct of the affairs of an "enterprise." (Doc. 1431, Jury Instruction No. 18). The sole purpose of the "enterprise," as alleged in the Superseding Indictment and argued at trial, was to commit violent acts in Israel and the Occupied Territories, in other words, to commit murders abroad. (Doc. 636 at 3 & 8). The indictment alleges, according to the PIJ Manifesto or Bylaws, that the "only purpose of the PIJ was to destroy Israel and to end all Western influence . . . in the region regardless of the cost to the inhabitants" and that "martyrdom style" was the only

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[9] The defense's legal arguments that certain acts did not constitute "murder" presented by motion to the Court were not made before the jury.

means of achieving that goal. (*Id.* at 3). During closing arguments, the government contended that the PIJ's overall goals were murder and extortion, and that the PIJ had no lawful activities.[10] The government further argued that when Mr. Fariz sent the money to Abu Hassanein and Bulbol, after his 1995 call with Suleiman Odeh concerning Beit Lid and his 2001 web posting to qudsway.com, his continued fund-raising and money transfers showed that Mr. Fariz had a continuing agreement to murder abroad. The government, in short, contended that Mr. Fariz had the specific intent to further the violence of the PIJ.

The jury, to have acquitted of Count 2 and the material support counts, must have rejected these arguments and found that Mr. Fariz did not transfer the money with the specific intent to further the unlawful activities of the PIJ and that he did not conspire to murder. Such findings, considering the facts and circumstances of the case against Mr. Fariz, should preclude re-prosecution of Mr. Fariz for RICO conspiracy. Specifically, because the jury has already found that he did not conspire to murder and that he did not intend to fund the murders or extortion, and because murder and extortion were the only alleged objectives of the PIJ, the government should be foreclosed from re-litigating whether Mr. Fariz conspired to participate in an enterprise with these sole objectives.

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[10] The parties have not ordered the transcripts of the closing arguments; therefore, the arguments herein based on statements made in closing arguments are derived from defense counsels' notes. Should the Court determine that transcripts of the closing arguments would be necessary for a determination of any issue raised by this motion, counsel for Mr. Fariz will order the transcripts and would ask for leave to supplement this motion.

Mr. Fariz recognizes that in *United States v. Shenberg*, 89 F.3d 1461 (11th Cir. 1996), the Eleventh Circuit held that collateral estoppel does not bar the use of evidence of acquitted substantive counts as predicate acts in a RICO conspiracy prosecution.[11] The Court based its holding on the reasoning that the actual commission of the underlying crime was not an "essential element" of a RICO conspiracy and on the Supreme Court's decisions in *United States v. Felix*, 503 U.S. 378 (1992) and *Dowling v. United States*, 493 U.S. 342 (1990). *Id.* at 1479-80. The Eleventh Circuit found that *Dowling* had changed the rule of law, such that previous cases holding that "the doctrine of collateral estoppel bars the government from introducing the underlying evidence of acquitted substantive counts in the retrial of the mistried conspiracy count" were no longer good law. *Id.* at 1480 n.23. The Eleventh Circuit then determined that *Felix*, which held that the government could rely on overt acts based on substantive offenses for which the defendant had been previously convicted to prosecute a conspiracy offense, meant that the government was not barred from using acquitted substantive offenses as predicate acts to prove a RICO conspiracy. *Id.* at 1480-81.

Respectfully, Mr. Fariz contends that *Shenberg* is not determinative of the Court's decision in this case. First, *Dowling* does not actually stand for as broad a principle as *Shenberg* asserts. *Dowling* involved the government's attempt to use, as other-crimes evidence under Federal Rule of Evidence 404(b), testimony of a victim of *another robbery* in the retrial on a robbery. 493 U.S. at 344-45. *Dowling*, therefore, does not present the

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[11] Mr. Fariz would note that *Shenberg* considered the issue of the introduction of evidence, not the bar to prosecution.

same situation of a retrial of a robbery based on facts that a previous jury must have found in the defendant's favor, or more simply, in a retrial of the same robbery. *Id.* at 348; *cf. Ashe*, 397 U.S. at 437-40. Instead, the issue considered in *Dowling* was more narrow, in that the Supreme Court resolved that the use of Rule 404(b) evidence is not "in all circumstances" barred by the doctrine of collateral estoppel. 493 U.S. at 350.

Second, while the Supreme Court in *Felix* held that a conspiracy crime is distinct from a substantive crime, and the double jeopardy clause did not prevent the prosecution of a conspiracy charge based in part on overt acts consisting of substantive offenses for which the defendant was already convicted, 503 U.S. at 387-92, the situation in *Felix* is different than that presented here. Unlike in *Felix* where the defendant was convicted of the substantive offense, 503 U.S. at 380-81, Mr. Fariz was *acquitted* of the substantive offenses and of the conspiracy to murder. With respect to the material support charges, Mr. Fariz was alleged and argued to be the "doer," not the mere "conspirer." If what he did was not unlawful, as demonstrated by the jury's verdicts of not guilty in the material support counts, then any agreement in which he entered was not illegal. *Whiteside*, 285 F.3d at 1351 n.1. While Mr. Fariz was not alleged himself to have been involved in any violence – in fact the government stipulated that he and the other Defendants did not personally participate in any of the violence or murders – the jury acquitted him of conspiracy to murder. These findings, based on a rational and realistic view of the charges and evidence against Mr. Fariz, mean that collateral estoppel should bar the government from re-prosecuting Mr. Fariz for RICO

conspiracy, where the sole objectives of the PIJ were alleged to be murder and extortion.[12] Accordingly, Mr. Fariz respectfully requests that this Court dismiss Count One.

**F. Count 20 – Travel Act**

Count 20 alleges that, by a telephone conversation between Mr. Fariz and Salah Abu Hassanein on November 10, 2002, Mr. Fariz used a facility in interstate and foreign commerce with the intent (a) to commit any crime of violence to further the unlawful activity of extortion and money laundering and (b) to otherwise promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of extortion and money laundering, in violation of 18 U.S.C. § 1952(a)(2) and (3), respectively. Because of the jury's findings of fact that they made in acquitting Mr. Fariz of the conspiracy to murder and of material support, the government should be precluded from re-prosecuting Mr. Fariz on Count 20.

To avoid burdening the Court with unnecessary repetition, Mr. Fariz would reincorporate by reference and assert the elements that the government would have had to prove with respect to this offense, as set forth in his renewed motion for judgment of acquittal. (Doc. 1478). Mr. Fariz would also reassert his arguments made above concerning

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[12] While *Corley* and *Shenberg*, respectively, held that the government may prosecute conspiracy cases after substantive acquittals and use the evidence of the acquitted conduct in the conspiracy prosecution, this Court should consider the specific facts and circumstances of this case, consistent with *Ashe's* direction that collateral estoppel should not be applied with a "hypertechnical and archaic approach of a 19th century pleading book" to avoid rejecting "the rule of collateral estoppel in criminal cases." 397 U.S. at 444.

the findings of fact that the jury must have made to have acquitted Mr. Fariz of conspiracy to murder and of the substantive material support counts.

Considering that the jury acquitted Mr. Fariz of conspiracy to murder, and the government never produced any other evidence or made any other argument concerning acts of violence, then the government should be precluded from re-prosecuting Mr. Fariz based on an allegation that he engaged in this telephone conversation with the intent to commit a crime of violence, in violation of 18 U.S.C. § 1952(a)(2). Mr. Fariz would therefore request dismissal of Count 20 under 18 U.S.C. § 1952(a)(2).

In addition, in light of the jury's finding that Mr. Fariz did not provide the money referenced in this telephone call with Abu Hassanein to the PIJ with the specific intent to further the unlawful activities of the PIJ, this finding of fact precludes the government from subsequently arguing that Mr. Fariz engaged in this telephone call to otherwise promote, manage, carry on, or to facilitate the promotion, management, or carrying on of the unlawful activities of extortion or money laundering. Mr. Fariz would therefore request that the Court dismiss Count 20's charge of a violation of 18 U.S.C. § 1952(a)(3).

## III. Conclusion

Based on the foregoing, Mr. Fariz respectfully requests that this Court dismiss Counts 1, 3, 4, 20, 33, 38, 39, and 40.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 3rd day of January, 2006, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; Alexis L. Collins, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian.

/s/ M. Allison Guagliardo
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